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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GLORIA M. SANCHEZ et al.,

Plaintiffs and Appellants,

v.

GIROMEX, INC., et al.,

Defendants and Respondents.

D042459

(JCCP No. 4159
[2 coordinated cases]*)

APPEAL from a judgment of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Affirmed.

Plaintiffs Gloria M. Sanchez and Esteban Ramirez appeal a summary judgment favoring defendants Giromex, Inc., et al. on plaintiffs' first consolidated amended class action complaint for violations of (1) the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.); (2) the Consumers Legal Remedies Act (CLRA) (Civ. Code,

* *Sanchez v. Giromex Corporation* (Super. Ct. San Diego County, No. GIC749775); *Ramirez v. Giromex, Inc.* (Super. Ct. San Diego County, No. BC239121).

§ 1750 et seq.); and (3) the false advertising law (FAL) (Bus. & Prof Code,¹ § 17500 et seq.).² Seeking reversal, plaintiffs contend the court erred in granting summary judgment because the record assertedly contained evidence establishing the existence of triable issues of material fact on each of their causes of action. Plaintiffs also contend the court committed evidentiary error by not excluding the declaration of defendants' expert witness. Because plaintiffs have not shown the court reversibly erred by entering a defense summary judgment, we affirm the judgment.

I

INTRODUCTION

Defendants operated businesses in California that transmitted money abroad. In advertising their money transmission services, defendants allegedly represented that only a small flat fee would be charged for transmitting funds abroad based on the specific amount to be transmitted.

Consumers presented United States dollars to defendants to transmit Mexican pesos to designated recipients in Mexico. The currency exchange market for pesos floated, fluctuated and changed "hourly." Defendants bought pesos in bulk at a

¹ Unless otherwise specified, all further statutory references are to the Business and Professions Code.

² The defendants other than Giromex, Inc. (Giromex) were Giromex S.A. de C.V. (Giromex S.A.), Casas de Cambio El Gallo, LLC (Casas), Juan Carlos Lebrija, Jaime Muller, and Luis Echeverria.

wholesale price for purposes of providing pesos to recipients in Mexico. In converting consumers' dollars to pesos, defendants used a currency exchange rate for pesos that was higher than the wholesale currency exchange rate at which defendants bought pesos for delivery to the recipients in Mexico. The difference between defendants' purchase price and defendants' selling price is described by plaintiffs as the foreign exchange spread (FX spread). Defendants did not disclose the FX spread to consumers.

After using defendants' money transmittal services to send money to relatives in Mexico, plaintiffs Sanchez and Ramirez each filed a class action lawsuit against defendants for false or misleading advertising on the theory the FX spread constituted an additional and undisclosed fee imposed on consumers. After plaintiffs' lawsuits were coordinated, the court certified the class as "all California consumers who paid dollars to defendants to transmit pesos to Mexico."

Plaintiffs then filed their first consolidated amended class action complaint alleging defendants violated the UCL, the CLRA and the FAL by not disclosing that defendants were making a profit by buying pesos in bulk in order to fund their individual money transmission transactions. As plaintiffs acknowledge, this lawsuit alleges "identical claims for false and misleading advertising as the predicate for violations" of those three statutory schemes.

Answering plaintiffs' first consolidated amended class action complaint, defendants affirmatively alleged their challenged practices were not unlawful because they complied with all applicable statutes and regulations. Defendants Giromex, Casas, and Giromex S.A. also expressly alleged Financial Code section 1815 governed the

presentation of advertisements and signs at or near money transmitters operating in California.

Defendants filed motions for summary adjudication on plaintiffs' causes of action for violations of the UCL and the FAL. Consistent with their pleaded affirmative defenses, defendants' motions asserted they were immune from liability under the UCL and the FAL because the receipts given by defendants to plaintiffs and class members upon completion of their money transmission transactions complied with Financial Code section 1815. Defendants also moved under Civil Code section 1781, subdivision (c)(3) for an order that plaintiffs' cause of action for violation of the CLRA was "'without merit.'"

After hearing, the superior court granted defendants' motions. The court rejected plaintiffs' contention that defendants' nondisclosure of the FX spread constituted false or misleading advertising. In concluding defendants had not engaged in false or misleading advertising, the court stated: "Logic, as well as the Legislative intent behind the laws enacted to regulate money transmitters, demonstrate that the gain realized through the secondary bulk exchange of dollars for pesos is not a cost that must be disclosed to consumers. Therefore, defendants' 'advertising' fairly represented the cost (e.g., the flat fee). Also, it is undisputed that the exchange rate advertised was actually offered to plaintiffs." The court further stated that plaintiffs "were not deceived because they received the advertised exchange rate and were charged the advertised flat fee." The court also stated its analysis was "supported by the express language and legislative

history" of Financial Code provisions regulating the business of transmitting money abroad.

Because its "combined rulings" on defendants' motions disposed of the "entire action," the superior court concluded defendants were entitled to judgment in their favor. Accordingly, the court entered summary judgment favoring defendants. On this appeal by plaintiffs, we determine the defense summary judgment was proper because plaintiffs have not established the existence of any triable issue of material fact on their first consolidated amended class action complaint's claims for violations of the UCL, the CLRA or the FAL.

II

FACTS

For purposes of determining the propriety of (1) the summary adjudications favoring defendants on plaintiffs' causes of action for violation of the UCL and the FAL and (2) the order determining plaintiffs' cause of action for violation of the CLRA to be without merit, we state the facts undisputed by the parties and other facts in the light most favorable to plaintiffs. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 642 (*Podolsky*); cf. *Kagan v. Gibraltar Sav. & Loan Assn.* (1984) 35 Cal.3d 582 (*Kagan*).)³

³ Civil Code section 1781, subdivision (c)(3), a portion of the CLRA, "provides a means of resolving CLRA actions prior to trial" through a process "for determining if '[t]he action is without merit or there is no defense to the action.'" (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 624 (*Olsen*).)

Giromex was a California corporation. Its principal operating officers were Lebrija (president), Echeverria (vice-president and chief of operations) and Muller (vice-president and director).⁴ Giromex provided money exchange and money transmission services, particularly to Mexican nationals living in the United States who wanted to transmit money to relatives or friends in Mexico. Giromex conducted its business in Southern California through authorized retail agents. Casas was an affiliated entity formed to allow Giromex to expand its money transmission services. Giromex operated approximately 30 wholly owned Southern California branches through Casas. Giromex S.A. maintained Giromex's bank accounts in Mexico and operated as pay agent for the transfer of money to designated recipients in Mexico.

In *Kagan, supra*, 35 Cal.3d 582, the defendant brought a motion for summary judgment under Code of Civil Procedure section 437c on the ground the plaintiff's action lacked merit. Although "originally denominated one for summary judgment," the defense motion "was allowed to be treated as a motion to determine that the action [was] without merit under [Civil Code] section 1781, subdivision (c)(3) in light of the [CLRA's] explicit exclusion of summary judgment motions in actions commenced as class actions." (*Kagan*, at p. 589, fn. 2.) The trial court in *Kagan* granted the defendant's motion on the ground the plaintiff had "not suffered any injury or sustained any damage cognizable" under the CLRA. (*Id.* at p. 589.) In reversing the defense judgment that the action lacked merit, the Supreme Court stated: "In light of the [defendant's] brochure's evident potential to mislead consumers, it can hardly be said that no *triable issue* exists whether [defendant] was guilty of false advertising prohibited by the [CLRA]." (*Kagan*, at p. 597, italics added.)

⁴ Lebrija, Echeverria and Muller never had any personal contact with plaintiffs before or during any of plaintiffs' money transmission transactions challenged in this case.

Giromex had an active business license from the California Department of Financial Institutions (DFI) that had never expired or been revoked. The DFI regularly audited Giromex in the course of business. Giromex annually submitted to the DFI consolidated and audited balances that included Casas.

The money transmission transactions of defendants Giromex and Casas were handled similarly. Defendants posted and distributed advertisements indicating consumers could transmit money to Mexico for a set transmission fee based on the amount of money being sent. Typically, upon entering into a retail agent location, a consumer used a Giromex-dedicated telephone to request transmission of money to Mexico. When connected with a Giromex customer services operator, the consumer gave the operator relevant information, including the consumer's name, address and phone number; the name of the designated recipient in Mexico; and the location where the funds were to be delivered. Giromex's customer service department generated a receipt that was faxed or transmitted by computer to the retail agent location. The retail agent collected from the consumer the dollars to be transmitted and the transmission fee. Upon completion of the transaction, the retail agent provided a receipt to the consumer. The consumer then phoned the designated recipient in Mexico to give the recipient the transaction code number for claiming the pesos.

Defendants made money from each money transmission transaction in two ways. First, each consumer paid the advertised flat transmission fee displayed at the retail location. Second, by purchasing pesos on the floating market at wholesale rates and selling pesos at retail rates, defendants gained revenue from the FX spread. Defendant

Echeverria selected the daily rate of exchange and his department's employees disseminated that daily rate to defendants' agents. Upon completion of a money transmission transaction, defendants gave the consumer a receipt stating the currency exchange rate that was used in the transaction. Defendants never disclosed to consumers the existence or amount of the FX spread.

In March 2000 plaintiff Sanchez entered a Casas retail location in San Diego to send \$50 to her aunt in Mexico for her grandmother. Sanchez understood she would give defendants \$50 and the money would be in pesos when her aunt received it. Inside the retail office, Sanchez saw a sign displaying prices for transmitting specified amounts of money. The stated price for sending \$50 was \$9.50. Sanchez did not see any sign listing the rate of exchange and defendants told her nothing about the exchange rate. Sanchez went to the counter, completed the paperwork, presented the \$50 and paid the \$9.50 transmission fee. Sanchez was then given a receipt that listed her transaction's dollar amount (\$50), transmission cost (\$9.50), other cost (\$0.00), total (\$59.50), rate of exchange (8.8500), and peso amount (442.50).

In 2000 and 2001, plaintiff Ramirez used Giromex's services in Los Angeles on 10 occasions. Ramirez's sister had recommended Giromex's business as a place where he could check out the rate of exchange and money could be sent. Ramirez saw a sign inside the window stating the amount charged for sending specified monetary amounts. Ramirez did not see any sign displaying the exchange rate. On each of Ramirez's receipts, the "other cost" line indicated there was no cost for using Giromex's money transmission services other than the disclosed small flat fee.

Although plaintiffs had a right under the Financial Code to request a refund for the money transmission services of Giromex and Casas, plaintiffs did not do so. Instead, they commenced this litigation.

III

PLAINTIFFS' FIRST CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Plaintiff's first consolidated amended class action complaint alleged defendants' money transmission services purported to offer the public an inexpensive means of transferring relatively small sums of money to Mexico from defendants' California locations; signs outside those locations offered to transmit money to Mexico for a small flat fee of approximately \$10; however, as part of a conspiracy to deceive consumers through a purported "Money Skimming Scheme," defendants actually charged consumers more than the small flat fee for their money transmission services; defendants secretly imposed that additional charge by misrepresenting to plaintiffs and the class members the rate of exchange at which the consumers' dollars were converted to Mexican pesos; and defendants retained "as profit" the difference between their actual rate of exchange and the rate represented to consumers, "effectively an additional charge for the . . . service."

In particular, plaintiffs alleged defendants' purported "Money Skimming Scheme" included (1) advertising designed to deceive consumers into believing the money transmission transactions would cost only a small flat fee, (2) establishing exchange rates for dollars into pesos on a daily basis so as to maximize their revenues, (3) setting the "money transmission fee" charged to each consumer, and (4) using a "bogus" exchange rate. Plaintiffs also alleged defendants conspired to defraud consumers by (1) causing

deceptive advertising signs to be placed outside locations that offered the money transmission services at a price defendants knew was unavailable to consumers, (2) converting dollars to pesos at an exchange rate more favorable to defendants that was not disclosed to consumers, (3) disclosing to consumers a "bogus" exchange rate on their transaction receipts that defendants knew was not the rate at which they were actually converting consumers' dollars to pesos, and (4) retaining the difference between the two rates of exchange that constituted a profit and an additional charge for the money transmission services without disclosure to consumers.

Plaintiffs' first consolidated amended class action complaint also alleged that as a consumer, plaintiff Sanchez used defendants' money transmission services in San Diego on one occasion; specifically, after viewing a sign outside defendants' business location advertising the transmission of money to Mexico for a flat fee and believing she could send funds to Mexico for that fee, Sanchez entered the business, paid the \$9.50 fee to transfer \$50 to her designated recipient in Mexico, and was told by defendants that her \$50 would be converted to pesos at a rate of 8.85 pesos per dollar; however, defendants actually converted Sanchez's dollars to pesos at a rate more favorable to defendants; and as a "further profit/additional charge for her transfer," defendants retained the difference between their actual exchange rate and the "bogus" 8.85 rate disclosed to Sanchez.

Plaintiffs' charging pleading alleged further that as a consumer, plaintiff Ramirez used defendants' money transmission services in Los Angeles on various occasions; Ramirez responded to advertisements at defendants' location that offered transmission of money to Mexico for a flat fee; on each occasion, Ramirez paid the required fee and was

told by defendants that dollars would be converted to pesos at a specific conversion rate; however, defendants converted Ramirez's dollars to pesos at rates more favorable to defendants; and as "further undisclosed fees for his transfers," defendants retained the difference between the actual exchange rates and the "bogus" rates disclosed to Ramirez.

Based on those factual allegations, plaintiffs alleged defendants' actions violated: (1) the UCL because they included unlawful, unfair and fraudulent business practices with the capacity to deceive consumers; (2) the CLRA because they advertised their services with the intent not to sell them as advertised (Civ. Code, § 1770, subd. (a)(9)); and (3) the FAL because their advertising was untrue or misleading. By this lawsuit, plaintiffs sought injunctive relief, money damages and/or restitution as compensation for their monetary losses, and disgorgement of defendants' wrongfully earned profits and other gains from their purported "Money Skimming Scheme." We specifically note that plaintiffs have not claimed defendants gouged them by exchanging dollars for pesos at rates far higher than the retail market rate at the close of trading on the previous day.

IV

CALIFORNIA LAW PROHIBITING CONSUMER DECEPTION

A

The UCL

"California's unfair competition law (UCL) (§ 17200 et seq.) defines 'unfair competition' to mean and include 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (§ 17500 et seq.)].' (§ 17200.) The UCL's purpose is to protect

both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949 (*Kasky*).) That purpose includes "the right of the *public* to protection from fraud and deceit." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.)

"The UCL's scope is broad. By defining unfair competition to include any 'unlawful . . . business act or practice' [citation], the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. [Citation.] . . . By defining unfair competition to include also any 'unfair or fraudulent business act or practice' [citation], the UCL sweeps within its scope acts and practices not specifically proscribed by any other law." (*Kasky, supra*, 27 Cal.4th at p. 949, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).)

"The "unlawful" practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. [] It is not necessary that the predicate law provide for private civil enforcement. [] As our Supreme Court put it, section 17200 "borrows" violations of other laws and treats them as unlawful practices independently actionable under section 17200 et seq. [] "Unfair" simply means any practice whose harm to the victim outweighs its benefits. [] "Fraudulent," as used in the statute, does not refer to the common law tort of fraud but only requires a showing members of the public "are likely to be deceived." (Olsen, *supra*, 48 Cal.App.4th at pp. 617-618, citations omitted.)

"The coverage of section 17200 'is "sweeping, embracing "'anything that can properly be called a business practice and at the same time is forbidden by law.'""[]" (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 964, citing *Cel-Tech, supra*, 20 Cal.4th at p. 180.) [¶] "The use of the disjunctive in section 17200, 'referring to "any unlawful, unfair *or* fraudulent" practice,' (italics in original) means that 'a practice may be deemed unfair even if not specifically proscribed by some other law.' [] "'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful and vice versa.'" [] The unfair competition law has such a broad scope "'to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, . . . [section 17200] was intentionally framed in [such a broad manner] precisely to enable judicial tribunals to deal with the innumerable "'new schemes which the fertility of man's invention would contrive.'"" (*Wilner*, at pp. 964-965, citations omitted; accord, *Cel-Tech*, at p. 181; *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1288 (*Massachusetts*).)

B

The FAL

"California's false advertising law (§ 17500 et seq.) makes it 'unlawful for any person, . . . corporation . . . , or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those

services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ' (§ 17500.)"

(*Kasky, supra*, 27 Cal.4th at p. 950.) Thus, section 17500 "prohibits advertising property or services with untrue or misleading statements or with the intent not to sell at the advertised price." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 52.)

Under the FAL, "a statement is false or misleading if members of the public are likely to be deceived. . . . 'The statute affords protection against the probability or likelihood as well as the actuality of deception or confusion." (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 876 (*Chern*). Hence, to establish a violation of the FAL for untrue and misleading advertising, "it is necessary only to show that 'members of the public are likely to be deceived.'" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211 (*Committee*); accord, *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 451 (*Fletcher*); *Massachusetts, supra*, 97 Cal.App.4th at p. 1289.)

Because any action proscribed by section 17500 "is also an unfair business practice within the meaning of the UCL" (*Massachusetts, supra*, 97 Cal.App.4th at p. 1289, fn. 2), any violation of the FAL "necessarily violates" the UCL. (*Committee, supra*, 35 Cal.3d at p. 210; accord, *Kasky, supra*, 27 Cal.4th at p. 950.) Thus, the UCL and the FAL "in similar language prohibit false, unfair, misleading, or deceptive advertising." (*Committee*, at p. 211.) Those statutes "prohibit 'not only advertising which is false, but also advertising which although true, is either actually misleading or which

has a capacity, likelihood or tendency to deceive or confuse the public.' [Citation.] Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, 'it is necessary only to show that "members of the public are likely to be deceived."' (Kasky, at p. 951, citing Committee, at p. 211; accord, Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1267 (Bank); Chern, supra, 15 Cal.3d at p. 876.)

C

The CLRA

"The CLRA is set forth in Civil Code section 1750 et seq." (Massachusetts, supra, 97 Cal.App.4th at p. 1292.) "The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices" (Broughton v. Cigna Healthplans (1999) 21 Cal.4th 1066, 1077; Bescos v. Bank of America (2003) 105 Cal.App.4th 378, 395 (Bescos).) Civil Code section 1760 "contains an express statement of legislative intent: 'This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.'" (Broughton, at p. 1077.)

The CLRA "established a nonexclusive statutory remedy for "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. . . ." (Reveles v. Toyota By The Bay (1997) 57 Cal.App.4th 1139, 1154, citing Gallin v. Superior Court (1991) 230 Cal.App.3d 541, 545-546; disapproved on

other points in *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261; *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, fn. 6.) The CLRA's "remedies are cumulative." (*Bescos, supra*, 105 Cal.App.4th at p. 395.) The CLRA "allows a consumer 'who suffers any *damage*' as a result of the use or employment of a 'method, act, or practice' made *unlawful* by the [CLRA] to bring a class action on behalf of himself and other consumers similarly situated." (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 268, p. 344.)

Unlike the UCL's general proscription against "unfair" or "deceptive" acts or practices, the CLRA in Civil Code section 1770 "prohibits a variety of deceptive practices." (*Bescos, supra*, 105 Cal.App.4th at p. 395.) In particular, Civil Code section 1770, subdivision (a) provides in relevant part: "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: [¶] . . . [¶] (9) Advertising goods or services with intent not to sell them as advertised."

D

Chapter 14 of the California Financial Code

Division 1, chapter 14 of the Financial Code is entitled, "Transmission of Money Abroad." (Fin. Code, § 1800 et seq.) Financial Code section 1800, subdivision (a) provides: "It is the intent of the Legislature in enacting this chapter to protect the people of this state from being victimized by unscrupulous practices by persons receiving money for transmission to foreign countries and to establish a minimum level of fiscal

responsibility and corporate integrity for all entities engaging in the business of receiving money for transmission to foreign countries without regard to the method of transmission."

Financial Code section 1815 governs the rate of exchange and disclosure. In particular, Financial Code section 1815, subdivision (a) provides: "The receipt presented to each customer for each transaction pursuant to subdivision (b) of Section 1810.5 shall clearly state the rate of exchange for the particular transaction, the amount of commission or fees, and the net exchange after all fees and commissions have been deducted. The receipt shall also state the total amount of currency presented by the customer and the total amount to be delivered to the beneficiary designated by the customer. These disclosures shall be in English and in the same language as that principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, at that office if other than English."⁵

⁵ Similarly, Financial Code section 1815, subdivision (b) provides: "All window and exterior signs concerning the rates of exchange shall clearly state in English and in the same language principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, at that office if other than English, the rate of exchange for exchanging the currency of the United States for foreign currency. All interior signs and all advertising, *if rates are quoted*, shall clearly state the rates of exchange for exchanging the currency of the United States for foreign currency and shall state all commissions and fees charged on all transactions." (Italics added.) The highlighted portion of Financial Code section 1815, subdivision (b), effectively disposes of any contention by plaintiffs that defendants acted wrongfully in not posting exchange rates at all their retail business locations.

V

DISCUSSION

Seeking reversal of the defense summary judgment, plaintiffs contend they presented evidence sufficient to raise triable issues of material fact bearing on whether defendants violated the UCL, the CLRA and the FAL by disseminating false or misleading advertisements representing that funds would be transmitted to Mexico for a disclosed small flat fee while, in actuality, defendants imposed an additional fee in the amount of the FX spread without disclosure to consumers. Plaintiffs also contend that in addition to failing to disclose the fact or amount of the FX spread to consumers, defendants gave Sanchez and Ramirez receipts that affirmatively misrepresented there was no cost to their money transmission transactions other than the advertised small flat fee. Asserting California law entitled defendants' consumers to notice of the FX spread in order to make an informed decision regarding use of defendants' money transmission services, plaintiffs conclude defendants' conduct in concealing and obscuring from consumers the additional currency exchange charge imposed for those services was likely to deceive consumers and thus actionable under the UCL, the CLRA and the FAL. (*Kasky, supra*, 27 Cal.4th at p. 951; *Committee, supra*, 35 Cal.3d at p. 211; *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1163-1170 (*Schnall*).)

On appeal, we review de novo the superior court's ruling granting defendants' motions for summary adjudication on plaintiffs' causes of action for violation of the UCL and the FAL. (*Aguilar, supra*, 25 Cal.4th at p. 860; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) In doing so, we "must independently determine as a matter of law the

construction and effect of the facts presented." (*Podolsky, supra*, 50 Cal.App.4th at p. 642.) Similarly, in reviewing the court's determination that plaintiffs' cause of action for violation of the CLRA was without merit, we must determine whether this record contained evidence sufficient to demonstrate the existence of a triable issue of material fact on whether defendants violated the CLRA. (*Kagan, supra*, 35 Cal.3d at p. 597.) As we shall explain, on this record defendants were entitled to judgment as a matter of law and plaintiffs have not shown the superior court reversibly erred by not reaching a contrary result.

A

Plaintiffs' Contentions

In granting defendants' motions, the superior court characterized plaintiffs' first consolidated amended class action complaint as "predicated on a single alleged unlawful act," namely, defendants' failure "to disclose to consumers the fact that the exchange rate offered is less favorable than the bulk exchange rate (the 'Money Skimming Scheme')." We concur in the superior court's characterization of plaintiffs' charging pleading. Similarly, we interpret plaintiffs' primary appellate contention to be that defendants engaged in false or misleading advertising violating the UCL, the CLRA and the FAL by not disclosing the FX spread to consumers. However, plaintiffs' appellate briefs may also be construed to contend, albeit inartfully, that defendants violated those statutes by not disclosing to consumers the fact that a currency exchange rate would be used during the portion of their money transmission transactions involving conversion of dollars to pesos. Both of those contentions are meritless.

B

Nondisclosure of the Use of a Currency Exchange Rate

To the extent plaintiffs contend defendants engaged in false or misleading advertising by not disclosing to consumers that a currency exchange rate would be used in defendants' money transmission transactions, this evidentiary record belies any such contention. As noted, undisputed evidence indicated that when she entered defendants' business, plaintiff Sanchez knew she would be giving dollars to defendants and that those funds would be converted to pesos for transmission to her designated recipient in Mexico. Further, Sanchez was given a receipt that showed the currency exchange rate used in her transaction. Similarly, the receipts given to plaintiff Ramirez by defendants for each of his money transmission transactions showed the rate of exchange used in each such transaction. Moreover, undisputed evidence indicated that at the time he began patronizing defendants' business, Ramirez was aware that a currency exchange rate would be used in his money transmission transactions because his sister had recommended use of defendants' business as a place where he could check out the exchange rate and send money.

Additionally, to the extent plaintiffs contend defendants engaged in false or misleading advertising by not disclosing to consumers that a currency exchange rate would be used in defendants' money transmission transactions, any such contention would be inconsistent with various allegations in plaintiffs' first consolidated amended class action complaint. Specifically, plaintiffs alleged that (1) defendants "misrepresent[ed] to plaintiffs and the members of the Class the rate of exchange at

which the consumers' dollars are actually converted to pesos"; (2) when Sanchez entered defendants' business and paid the advertised \$9.50 flat fee, she was told by defendants that "her \$50 would be converted to pesos at a rate of 8.85 pesos per dollar"; (3) "Sanchez believes that the disclosed 8.85 conversion rate that was disclosed to her was bogus"; (4) "Sanchez believes" that "defendants retained the difference between their actual exchange rate and the bogus 8.85 rate that was disclosed to Sanchez as further profit/additional charge for her transfer"; (5) on each occasion Ramirez used defendants' money transmission services, he was told by defendants "that his American dollars would be converted to pesos at a specified conversion rate"; (6) "Ramirez believes that the conversions [*sic*] rates that were disclosed to him were bogus"; and (7) "Ramirez believes" that "defendants retained the difference between the actual exchange rates and the bogus rates that were disclosed to Ramirez as further undisclosed fees for his transfers."⁶

⁶ After plaintiffs filed this lawsuit, defendants apparently changed their receipts at some retail agent locations to state: "CURRENCY EXCHANGE: All payments will be made in Mexican currency. *In addition to the transfer fee applicable to this transaction, a currency exchange rate will be applied.* United States currency is converted to Mexican currency at an exchange rate set by Giromex, Inc. *Any difference, between the rate given to customers and the rate received by Giromex, Inc. and in some cases its Mexican agents, is in addition to the transfer fee.* Please ask the clerk for information concerning the currency exchange applicable to your transaction." (Italics added.) To the extent plaintiffs contend such later modification of the receipts constituted an admission by defendants that their customers incurred a hidden charge in violation of the Financial Code regulatory scheme, plaintiffs have not demonstrated the existence of any such statutory violation. Further, plaintiffs have not identified anything in the evidentiary record indicating the reason why defendants modified the receipts.

In sum, plaintiffs knew that in addition to paying the small flat fee, they would also have to present defendants with dollars to be converted into pesos for transmission to Mexico. Plaintiffs also knew that such currency conversion would entail application of a rate of exchange. Because of that knowledge, it was not reasonably likely that plaintiffs could have been deceived by defendants' advertising to believe that defendants would convert plaintiffs' dollars to pesos for transmission to plaintiffs' designated recipients in Mexico without using any currency exchange rate. (*Kasky, supra*, 27 Cal.4th at p. 951; *Bank, supra*, 2 Cal.4th at p. 1267; *Committee, supra*, 35 Cal.3d at p. 211; *Fletcher, supra*, 23 Cal.3d at p. 451; *Chern, supra*, 15 Cal.3d at p. 876; *Massachusetts, supra*, 97 Cal.App.4th at p. 1289; *Schnall, supra*, 78 Cal.App.4th at pp. 1163-1170; *Olsen, supra*, 48 Cal.App.4th at p. 618.)

C

Nondisclosure of FX Spread

Plaintiffs contend defendants' challenged practice of not disclosing the FX spread to consumers while concurrently advertising that only a small flat fee would be charged for their money transmission services violated the UCL, the CLRA and the FAL. Repeatedly characterizing the FX spread as defendants' "profit" from consumers wishing to send funds to Mexico, plaintiffs contend the evidence established actionable nondisclosure and misrepresentation by defendants with respect to that profit. Plaintiffs conclude defendants' advertising was likely to deceive unwary consumers. However, on this record plaintiffs have not shown the existence of any triable issue of material fact bearing on whether defendants' challenged practice, alleged to constitute false or

misleading advertising, was unfair, unlawful or fraudulent for purposes of the UCL, the CLRA or the FAL. Although "what is unfair or fraudulent, unlike unlawfulness, is [generally] a question of fact" (*Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886, 894-895 (*Community*)), plaintiffs failed to show any reasonable likelihood that defendants' advertising would deceive or confuse plaintiffs because, as discussed, plaintiffs were aware defendants' money transmission services would involve currency conversion and use of a currency exchange rate. Further, as the superior court observed, plaintiffs "were not deceived because they received the advertised exchange rate and were charged the advertised flat fee."

Citing the legislative intent set forth in Financial Code section 1800, the superior court stated there was "nothing in this declared intent seeking to regulate the transmitter's ability to earn a profit on the currency exchange, regulate the appropriate rate of exchange or regulate the disclosure of this profit." The parties' appellate briefs argue at length about the effect on this case of the Financial Code provisions governing transmission of money abroad. Consistent with their pleaded affirmative defenses, defendants contend their conduct was lawful under the Financial Code. (*Cel-Tech, supra*, 20 Cal.4th at pp. 182-183.) Asserting Financial Code section 1815 does not specifically bar their causes of action and does not permit defendants' alleged false and misleading advertising, plaintiffs contend the superior court erred in essentially concluding defendants' conduct was consistent with the Financial Code requirements. (*Cel-Tech*, at pp. 183-184; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 603.)

The record indicates each transaction receipt given by defendants to plaintiffs appeared to comply with Financial Code section 1815, subdivision (a)'s requirements by stating the rate of exchange for the transaction, the total amount of currency presented by plaintiffs, and the total peso amount to be delivered to the designated recipient in Mexico. Thus, the receipt received by Sanchez stated the dollar amount of \$50, the rate of exchange of 8.8500, and the peso amount of 442.50. However, Sanchez's receipt stated a transmission cost of \$9.50, other cost of zero, and total of \$59.50. Since defendants did not disclose the fact or amount of the FX spread to Sanchez on her receipt or otherwise, the parties dispute whether the receipt accurately stated the (1) the amount of commission or fees and (2) the net exchange after deduction of all fees and commissions. The Financial Code provisions governing transmission of money abroad do not discuss the FX spread. Because those statutory provisions do not clearly permit or clearly prohibit nondisclosure of the FX spread, we do not ground our analysis on those provisions.

Nevertheless, we must address plaintiffs' contention that by assertedly employing two rates of exchange to facilitate their purported "Money Skimming Scheme" instead of using only one exchange rate, defendants did not comply with Financial Code section 1815. Specifically, plaintiffs contend that because defendants did not "disclose the hidden fee, cost, or charge" they "surreptitiously extract[ed] from [their] customers via the Money Skimming Scheme," defendants' advertising did not comply with Financial Code section 1815, subdivision (b)'s requirement to "'state all commissions and fees charged on all transactions.'" However, contrary to plaintiffs' contention, defendants complied with Financial Code section 1815 and their business practice with respect to the

FX spread was not deceptive. Plaintiffs' argument ignores the economic substance of the challenged money transmission transactions.

Plaintiffs presented dollars to defendants for conversion to pesos for purposes of transmitting pesos to plaintiffs' designated recipients in Mexico. As discussed, undisputed evidence indicated the currency exchange market for pesos was floating. As the superior court observed, the "exchange rate fluctuates." Undisputed evidence also indicated that since the pesos were not signed or labeled, defendants could not identify one peso from another peso. Thus, the court correctly observed that defendants do not convert into pesos the specific dollars involved in each individual money transmittal transaction but instead "buy pesos in bulk, and use these bulk funds to pay out pesos as the transactions occur."

In essence, plaintiffs fault defendants for not telling them that the dollars presented to defendants by plaintiffs would be converted to pesos for distribution to the designated recipients in Mexico at a currency exchange rate for pesos that was higher than the wholesale rate of exchange at which defendants bought pesos. The crux of plaintiffs' theory is that defendants should have disclosed the FX spread, namely, the difference between the exchange rate at which defendants bought pesos and the rate at which defendants sold pesos to plaintiffs. However, plaintiffs' theory is based on the fallacious assumption that (1) pesos converted from the specific dollars presented by plaintiffs were to be transmitted to the designated recipients in Mexico and (2) because the specific pesos were assertedly identifiable, the FX spread was a *cost* attributable to those pesos and the presenting consumer.

Plaintiffs' assumption is mistaken because money is a fungible commodity with a floating value. (*United States v. Sperry Corp.* (1989) 493 U.S. 52, 62, fn. 9 ["Unlike real or personal property, money is fungible"]; *People v. Gbadebo-Soda* (1995) 38 Cal.App.4th 160, 168 ["Money credits are fungible and lose their separate identity once commingled in an account"]; cf. *Bank of America Nat'l Trust & Sav. Com. Bank Asso. v. California Bk.* (1933) 218 Cal. 261, 273 (*Bank of America*).⁷) Further, as discussed, undisputed evidence indicated that because the pesos were not signed or labeled, defendants could not identify one peso from another. Moreover, in cases involving the legal sufficiency of settlement amounts, federal law indicates that because currency exchange rates float and dollars are fungible, the FX spread cannot be attributed to any particular dollars. (*In the Matter of: Mexico Money Transfer Litigation* (7th Cir. 2001) 267 F.3d 743, 749; *In re Mexico Money Transfer Litigation* (N.D. Ill. 2002) 164 F.Supp.2d 1002, 1014-1015.)

In *In re Mexico Money Transfer Litigation*, *supra*, 164 F.Supp.2d at pages 1014-1015, the federal district court observed: "Defendants note that at the time of each of the challenged transactions, the class members received a receipt that sets forth the fee paid

⁷ "Where a fungible, such as money, is made the subject of a pledge, trust or special deposit, in our view it can serve no purpose, and therefore it is not required, that the identity of the particular money delivered be preserved in specie, as by setting it aside in a marked bag or package. The test for determining whether a general deposit or a deposit for a special purpose exists is not, therefore, whether it was intended that specific coins or currency should be kept separate and apart in specie from other funds of the custodian. In ordinary commercial transactions, either with banks or individuals, such an intent almost never will be present, and certainly will not be presumed to exist in the absence of a clear expression thereof." (*Bank of America*, *supra*, 218 Cal. at p. 273.)

for the exchange, the exchange rate offered by Defendants, and the number of pesos that were to be converted to the recipient in Mexico. Although they acknowledge that the receipt does not disclose the fact that Defendants are able to purchase pesos at a more favorable exchange rate, Defendants argue that no such disclosure is required. As in any other commercial exchange, Defendants argue, they are entitled to recover a profit on their services without disclosing the amount of that profit. [¶] Absent a legal requirement that information be disclosed, there is ordinarily no claim for fraud based on non-disclosure of the information. [Citations.] According to [an international currency market expert], virtually every company in the business of providing retail currency exchange services recovers at least some revenue from the FX spread. [A banking expert testified] there is no law that requires a money transfer provider to disclose the rate at which it obtains foreign currency. [Citation.] [¶] Even if Plaintiffs could prove a fraudulent misrepresentation or omission, it is not clear that such a misrepresentation would relate to a material fact. [Testimony] explained that from a customer's point of view, the material facts in a transfer of money to Mexico are (a) the amount of the service charge; (b) the exchange rate offered; and (c) the number of pesos the intended recipient will recover — all facts that Defendants fully and truthfully disclose. The fact that Defendants obtain pesos themselves at a far more favorable rate is arguably not relevant to the consumer at all. Nor is the wholesale rate paid by a retailer for any consumer product or service ordinarily disclosed to a consumer paying the retail price. [¶] The exchange rate offered by Defendants is itself clearly disclosed on the customers' receipt,

and the interbank exchange rate is published in Spanish and English language newspapers."⁸

In *In the Matter of: Mexico Money Transfer Litigation*, *supra*, 267 F.3d at page 747, the federal appellate court observed that the California DFI "has never considered it necessary for regulated institutions to disclose (or hand over to the customer) the FX spread." The court also observed: "Money is just a commodity in an international market. [Citation.] Pesos are for sale — at one price for those who buy in bulk (parcels of \$5 million or more) and at another, higher price for those who buy at retail and must compensate the middlemen for the expense of holding an inventory, providing retail outlets, keeping records, ensuring that the recipient is the one designated by the sender, and so on. Neiman Marcus does not tell customers what it paid for the clothes they buy, nor need an auto dealer reveal rebates and incentives it receives to sell cars. This is true in financial markets no less than markets for physical goods. The customer of a bank's foreign-exchange section (or an airport's currency kiosk) is quoted a retail rate, not a wholesale rate, and must turn to the newspapers or the Internet to determine how much the bank has marked up its Swiss Francs or Indian Rupees. The holder of a checking account may be promised a small interest rate (say, 2%) on the balance and is not told at what rate the bank lends these funds to its own customers. Nor need the bank, or an intermediary such as MoneyGram, explain to customers how it profits from the float on

⁸ This record contained undisputed testimony by defendants Lebrija and Echeverria indicating that the business operations of defendants here were virtually identical to those at issue in *In re Mexico Money Transfer Litigation*, *supra*, 164 F.Supp.2d 1002.

funds it holds for a day or two between receipt and delivery. MoneyGram and Western Union revealed truthfully, and separately, the exchange rate they offered (the price per peso) and the rate for the wire transfer to Mexico. Each customer was told how many dollars in the United States would result in how many pesos delivered in Mexico. Nothing in this transaction smacks of fraud, so the settlement cannot be attacked as too low." (*Id.* at p. 749.)⁹

Here, defendants disclosed to consumers that defendants were (1) selling an amount of pesos to plaintiffs at a stated exchange rate, (2) sending that amount of pesos to the designated recipients in Mexico; and (3) charging a flat fee for transmitting the pesos. Considering the economic substance of the transactions, plaintiffs cannot establish defendants' challenged business practices involving the FX spread were deceptive. However, there remains the question whether defendants' advertisements were likely to deceive consumers by representing that only a small flat fee would be charged for defendants' money transmission services.

As discussed, plaintiffs acknowledge this lawsuit alleges "identical claims for false and misleading advertising as the predicate for violations" of the UCL, the CLRA and the FAL on the theory the FX spread constituted an additional and undisclosed *cost* imposed on consumers. Because plaintiffs are unable to show defendants' challenged business practices involving the FX spread were deceptive, the only potentially viable claim

⁹ *Covarrubias v. Bancomer, S.A.* (Ill.App. 2004 LEXIS 938), relied upon by plaintiffs, is not persuasive because it rests on an inapt analogy to automobile service contracts, not a floating currency market.

remaining available to plaintiffs is whether defendants' advertising allegedly representing that only a small flat fee would be charged for defendants' services was false or misleading. (Cf. *Kagan, supra*, 35 Cal.3d at p. 597.) Indeed, the gravamen of plaintiffs' opposition to the motions that resulted in the defense summary judgment was that advertisements disseminated by defendants were likely to deceive consumers and thus raised triable issues of material fact bearing on whether defendants engaged in false or misleading advertising.

Specifically, plaintiffs fault defendants for distributing two advertising fliers providing: (1) "POR SOLO 8.50 MANDE HASTA !!!!! \$300.00 !!!!!"; and (2) "MANDE \$\$ DINERO \$\$ A MEXICO HASTA \$300.00 POR \$9.50." In the superior court and on this appeal, defendants have objected to plaintiffs' proffered copies of those advertisements on the foundational ground of lack of proper authentication and the ground there was no certified English translation of the advertisements. The superior court disregarded "all evidence it considered to be incompetent and inadmissible."

Despite defendants' objections to the proffered advertisements, plaintiffs have not met their appellate burden to show by record references that the proffered advertisements were properly authenticated, accompanied by a certified English translation or actually received into evidence. (Evid. Code, §§ 400 et seq., 753; *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship* (1983) 146 Cal.App.3d 440, 445, fn. 3.) Manifestly, even if the proffered advertisements had been properly authenticated and admitted into evidence, in the absence of a certified English translation of those advertisements, we would be unable to make an independent determination whether they were likely to

deceive defendants' Spanish-speaking consumers — the crux of plaintiffs' action. As such, plaintiffs have not established any judicial error with respect to the court's apparent sustaining of defendants' evidentiary objections to the two proffered advertisements.¹⁰

Accordingly, because defendants showed entitlement to judgment as a matter of law on each of plaintiffs' causes of action and plaintiffs have not demonstrated any reversible judicial error, the defense summary judgment must be upheld.¹¹

VI

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

MCINTYRE, J.

¹⁰ Because our holding is not based on the Financial Code provisions governing transmission of money abroad or on anything in the declaration of defendants' expert Stanley Cardenas involving the creation, interpretation, enforcement or legislative intent of those statutory provisions, we need not reach plaintiffs' contention that the superior court erred in admitting Cardenas's declaration.

¹¹ We leave for another day the issue of any effect Proposition 64 might have on the factual scenario presented in this case.